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October 8, 2010

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Via Electronic Filing

Re: Notice of *Ex Parte* Presentation in MB Docket 10-56, Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses or Transfer Control of Licensees

Dear Ms. Dortch,

Pursuant to section 1.1206(b) of the Commission's rules, Free Press submits this notice regarding an *ex parte* communication in MB Docket 10-56, *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees*.

On October 7, 2010, Andrew Jay Schwartzman of Media Access Project (MAP), Adam Lynn and Corie Wright of Free Press met with the following FCC staff members: James Bird, Deborah Broderson, Noah Cherry, Neil Dellar, William Freedman, Marcia Glauberman, Jamila-Bess Johnson, Virginia Metallo, Chuck Needy, Joel Rabinovitz and Jennifer Tatel.

In the meeting, we presented our concerns with the proposed acquisition of NBC-Universal by Comcast Corp. Our discussion focused primarily on the confidential and highly confidential data submitted by Comcast and NBCU and how these data illustrate the threat the merger poses to the development of a competitive market for online video and "Over the Top" (OTT) video providers. We also discussed the inadequacy of Comcast and NBCU's commitments with respect to local NBC and Telemundo broadcast programming and the defects of the Applicants' proposed divestiture trust for the NBC-owned television station KWHY-TV in Los Angeles.

Online Video

Record evidence makes clear that the emerging market for online video, while nascent, holds the potential for substantial growth and poses a direct competitive threat to large cable operators such as Comcast. Comcast in turn has embarked on an aggressive campaign to ensure that online video never becomes a viable, direct competitor to its facilities-based MVPD services. In the meeting, Free Press and MAP outlined what we see as Comcast's strategy to prevent the erosion of its market power in video programming services through control of programming and distribution.

The most effective way to control content distribution is to own content, and the surest way to prevent online competitors from accessing the content they need to be competitive is to withhold it from them. In buying control of NBCU, Comcast seeks to acquire a stable of popular broadcast, cable, and feature film content which it can then withhold from online competitors. Importantly, the merger will also eliminate the competitive threat of NBCU entering into increased online distribution of its own programming. As a stand alone programmer, NBCU has incentives to make its content more widely available online. However, as a Comcast subsidiary, it would have an incentive to withhold its programming from providers that compete with Comcast's own online video and traditional cable offerings.

Free Press and MAP also explained that Comcast can complement its ability to withhold its own content by using its position as the dominant cable operator to pressure unaffiliated programmers into exclusive deals that prevent them from making their content available to Comcast's online-only competitors.[1] Comcast is the largest cable provider in the nation, and is the dominant MVPD in certain regions of the country. Because programmers rely on Comcast for the largest percentage of their MVPD subscriber fees, Comcast has tremendous capacity to force programmers to limit online distribution of content.

Finally, even assuming that some content "escapes" to competing online distributors, Comcast could still use its bottleneck control over broadband service to enhance access to affiliated content and services, while degrading access to those which compete with NBCU programming and platforms. Post-merger Comcast would be the only company that controls large amounts of content, cable operations, and access to broadband services. As such, it would be uniquely positioned with both the incentive and capacity to discriminate against competing online video providers. Without a *bona fide* network neutrality rule or condition placed on the merger, consumers and new online services will remain unprotected from these anticompetitive tactics.

Free Press and MAP expressed skepticism that conditions could adequately remedy the anticompetitive incentives resulting from the merger. We stated that a program-access rule-type merger condition may to a small degree remediate some harms stemming from the outright withholding of content from certain online video and OTT providers; however, on its own it would be insufficient to address other unfair practices that would thwart the development of online competition. For example, Comcast/NBCU could agree to sell programming to only those online video providers that require their customers to verify that they also subscribe to a MVPD service. Or Comcast/NBCU could refuse to sell its programming to online video providers whose technologies allow consumers to view

[1] *See*, Reply to Opposition of Free Press, Media Access Project, Consumer Federation of America and Consumers Union, MB Dkt 10-56, Appendix A, pp. 9-11 (Aug. 19, 2010).

online content via their TV screen.[2] By making a cable subscription mandatory to view online content, and making sure that that online content stays on the computer screen and does not migrate to the TV screen, Comcast/NBCU could force online video into the role of perpetual complement, rather than full scale competitor. Thus, to the extent that the FCC considers program access rule-type remedies as part of its merger review, it must also address tying and screen discrimination practices.

Local Programming

Free Press and MAP emphasized that the Applicants' "voluntary" promise to collectively provide an additional 1,000 hours per year of local programming for the NBC owned and operated stations is minor, dubious, and unenforceable. Indeed, the total commitment only adds up an additional 16 minutes per day, per NBC O&O station (assuming that such programming is evenly distributed among the stations). While any increase in local programming is welcome, sixteen minutes a day is a trifle given the scope of the merger and the resources of the merging parties.

Furthermore, we pointed out to staff that the Applicants have not clearly explained what they mean by local programming. There is no commitment that this programming will be locally-originated or will touch upon local news and public affairs. Moreover, neither the Commission nor the public can monitor or enforce this commitment under the terms Applicants have proposed. The Commission currently has no mechanism to require broadcasters to list the amount and types of programming aired, or, importantly, whether any "increase" in the provision of local programming is the result of repeating previously aired segments. Despite our enforceability concerns, Applicants have not volunteered to report on such programming themselves, so it is not clear how they intend to be bound by this commitment. As a consequence, neither consumers nor the Commission have the ability to determine the baseline amount of local news programming currently aired by NBC owned and operated stations, and certainly cannot determine whether Applicants are following through on their promise to increase local programming as a condition of the merger.

While Free Press and MAP are extremely skeptical of Comcast's promise to increase local programming for NBC owned and operated stations, it is both notable and curious that Applicants have not made a parallel promise to invest in local programming for Telemundo owned and operated stations. Under NBCU's ownership, Telemundo's local news operations have been significantly cut back. To the extent that Comcast's voluntary

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[2] Indeed, two months before Comcast announced its proposed merger with NBCU, Hulu, a video Web service co-owned by NBC, intentionally blocked the ability of Boxee media center to replay Hulu videos. Boxee essentially functions like a web browser that allows consumers to view online video via their television screens. Hulu's management reported that the blocking was conducted at the behest of NBC. To that end, NBCU CEO Jeff Zucker stated his company did not want Hulu content on Boxee because it was committed to keeping Hulu "an online experience." NBCU should have every incentive to make Hulu content viewable via a TV screen. Nevertheless, while negotiating a merger with Comcast, NBCU management decided that NBC content would be consigned to a delivery method which would not compete as effectively with Comcast's cable television services.

commitments regarding Telemundo are indicative of the amount of investment and attention that Comcast will devote to Spanish language broadcasting, we believe it is further evidence of the merger's potential adverse impact on diversity and localism, and the underserved Spanish language community in particular.

In conclusion, Comcast and NBC's local programming commitments leave much to be desired. Free Press and MAP explained that to convert these illusory promises into *bona fide* commitments would require a substantial increase in the amount of locally originated programming aired across both NBC and Telemundo owned stations, as well as a commitment to airing locally originated news and public affairs programming. Furthermore, to ensure that Applicants comply with these commitments, they should be required to regularly and publicly disclose the amount and types of local programming aired. The Commission could partially remediate this problem by requiring Comcast/NBCU to prepare and file the information required by Form 355.

KWHY-TV Divestiture Trust

Free Press and MAP also discussed the inadequacy of the "divestiture trust" that the merger Applicants have proffered to bring them into compliance with the Commission's multiple ownership rules. NBCU has been in violation of local television ownership rule for eight years through its control of a triopoly television combination in Los Angeles which was created when it purchased Telemundo in 2002. Moreover, NBCU has failed to comply with an eight year-old FCC order requiring NBCU to divest one of these stations. The Applicants have now made what purports to be a promise to divest the Spanish language station KWHY-TV. However, the device they propose to employ – a trust – is a thinly-veiled attempt to retain the station indefinitely while stalling until such time as they can lobby the Commission to change its duopoly rules.

The purpose of divestiture trust is to effectuate the orderly divestiture of broadcast properties that, if held outright, would violate the Commission multiple ownership rules."[3] Trusts should not be used to "warehouse" stations in excess of statutory limits.[4] Free Press and MAP explained that the Applicants' proposed divestiture trust agreement fails to accomplish this aim in two regards: first, it does not effectively insulate the Trustee from the influence of the transferring beneficiary (NBCU); and second, the trust as proposed enables Comcast/NBCU to hold the station indefinitely. In particular, retaining the right to set the sales price of the station enables the Applicants to make sure it is never sold. Because the trust's defects appear to be irremediable, we advised staff that the station should be divested prior to the merger's approval to prevent NBCU from retaining the station indefinitely in continued violation of the Commission's ownership rules.

[3] *See Corporate Ownership Reporting and Disclosure by Broadcast Licensees, Reexamination of the Commission's Rules and Policies Regarding Attribution of Ownership Interest on Broadcast, cable Television, and Newspaper Entities*, Report and Order, 97 FCC 2d 997, ¶53 (1984) ("Attribution Order")
[4] *See Applications of Stockholders of Infinity Broadcasting Corp. and Westinghouse Electric Corp. for Transfer of Infinity Broadcasting Corp.*, Memorandum Opinion and Order, 12 FCC Rcd 5012, ¶60 (1996) ("*Infinity Order*"); *See also Applications of Max Media Properties LLC and Sinclair Communications, Inc.*, Memorandum Opinion and Order, 13 F.C.C.R. 12489, ¶ 15 (1998).

Commercial Leased Access

We also discussed how the Commission's commercial leased access rules could be applied to facilitate carriage of independent programmers on Comcast's cable systems. We said the same scheme could also be used to allow access to online video offerings. Rules under which the Commission currently operate permit prohibitively expensive rates, making leased access effectively unavailable to most independent programmers. Applying the modified rules adopted by the Commission in November 2007, but currently subject to a judicial stay, or adopting a proposed alternative subsequently submitted to the Commission would provide an effective means of allowing carriage of independent programming. We noted that a very important characteristic of the leased access scheme is that it prohibits cable operators from exercising editorial control over the content of the programming carried on those channels.

Finally, Free Press and MAP stressed that the Communications Act requires merger applicants to demonstrate that the proposed transaction, on balance, will serve the public interest goals of competition, diversity and localism. Moreover, Comcast and NBCU must demonstrate that the merger would *enhance* public interest goals, and not merely preserve the *status quo*. Because the Applicants have not shown that the proposed transaction meets the requisite public interest standard mandated by the Communications Act, the transaction should not be approved by the Commission.

In accordance with the Commission's rules, this *ex parte* notice is being filed electronically in the above referenced docket. If you have any questions regarding this filing, please do not hesitate to contact me.

Respectfully submitted,
______/s/__________

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